



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 5, 1993

Mr. David J. Freeman
Executive Secretary
Texas Racing Commission
P.O. Box 12080
Austin, Texas 78711-2080

OR93-082

Dear Mr. Freeman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 17989.

The Texas Racing Commission (the commission) received a request from a newspaper for copies of two categories of information: "police incident reports, letters, complaints or anonymous complaints" pertaining to an individual who is a partner in a pari-mutuel Class 1 racetrack licensee "received on or about October 19" and "any internal records generated by receipt of those documents." You submitted two documents as responsive to this request. One is an incident report from the Austin Police Department that the Department of Public Safety submitted to your office in late October. The other is a memorandum from the commission's General Counsel regarding the police incident report. You assert these documents are excepted from required public disclosure under the Open Records Act. We agree.

With regard to the police incident report, you raise section 3(a)(1) of the Open Records Act in conjunction with section 5.04 of The Texas Racing Act (the act), V.T.C.S. article 179e. Section 3(a)(1) of the Open Records Act excepts from required public disclosure "information deemed confidential by law, either statutory, Constitutional or by judicial decision." Section 5.04(a) of the act authorizes the commission to obtain criminal history information about applicants for a racetrack license from the Department of Public Safety and the Federal Bureau of Investigation Identification Division. Section 5.04(c) of the act states that

Except as otherwise provided by this subsection, the criminal history record information received under this section by the commission from any law enforcement agency that requires the information to be kept confidential as a condition of release of the information is for the exclusive use of the commission and is privileged and confidential. Such criminal history record information

may not be released or otherwise disclosed to any person or agency except in a criminal proceeding, in a hearing conducted by the commission, on court order or with the consent of the applicant. Information that is in a form available to the public is not privileged or confidential under this subsection and is subject to public disclosure.

With the exceptions listed therein, this provision makes confidential any criminal history record information the commission receives pursuant to section 5.04 from a law enforcement agency that requires the information to be kept confidential. *See* Open Records Decision No. 613 (1993) at 2, n. 2. We are not informed about whether the Department of Public Safety required the commission to keep the incident report confidential as a condition of its release to the commission. In the absence of such a requirement, this provision in the act does not make the report confidential.

However, section 2.15 of the act generally makes the contents of the commission's investigatory files confidential. *See* Open Records Decision No. 567 (1990) (construing former section 2.15 with similar language). That provision states in pertinent part as follows:

The contents of the investigatory files of the commission, however, are not public records and are confidential except in a criminal proceeding, in a hearing conducted by the commission, on court order, or with the consent of the party being investigated.

An investigation report or other document that the Department of Public Safety has submitted to the commission becomes part of the commission's investigative files. V.T.C.S. art. 179e, § 2.16(b). As mentioned above, the Department of Public Safety submitted the police report at issue to the commission. Thus, the report is part of the commission's investigatory files. We conclude that, since under section 2.16(b) the report is part of the commission's investigatory files, the report is deemed confidential under section 2.15 of the act. *See* Open Records Decision No. 548 (1990) (construing former section 2.15 with similar language). Section 3(a)(1) of the Open Records Act, in conjunction with section 2.15 of the act, prohibits the commissions from releasing the report.¹

We turn now to the memorandum that the commission's General Counsel prepared. Section 3(a)(7) of the Open Records Act protects communications within the attorney-client privilege. Open Records Decision No. 574 (1990). This protection applies to factual information or requests for legal advice that the client has communicated to the attorney and to legal advice or opinion that an attorney has rendered to a client. *Id.* You say that the memorandum memorializes discussions between the General Counsel and you.

¹Section 2.16(b) of the act gives the subject of an investigatory report a right to discover the information. Open Records Decision No. 613 (1993).

Documents memorializing client communications to the attorney regarding the subject matter of the legal representation are privileged. *See id.* at 3. The memorandum also contains legal advice and opinion. We conclude that you may withhold the memorandum pursuant to section 3(a)(7) of the Open Records Act. *See id.*

As we have resolved this request under sections 3(a)(1) and 3(a)(7) of the Open Records Act, we need not consider the other exceptions you raise to the required public disclosure of this information. Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-082.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Opinion Committee

KHG/lmm

Ref.: ID# 17989

Enclosure: Submitted documents

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